

STATE OF MICHIGAN
COURT OF APPEALS

TIMOTHY O'NEILL and SUZANNE O'NEILL,

Plaintiffs-Appellees/Cross
Appellants,

v

SOILS & STRUCTURES, INC. and WILLIAM
HOHMEYER,

Defendants-Appellants/Cross
Appellees,

and

MICHAEL REAGAN and MICHAEL OHRLING,

Defendants-Intervening
Plaintiffs/Cross Appellees,

and

JIM BRICKER, LEE RUHL, SAMUEL T.
WAKEFIELD, and HUNNINGTON
DEVELOPMENT,

Defendants-Not Participating.

UNPUBLISHED

October 11, 2002

No. 228364

Muskegon Circuit Court

LC No. 97-337960-CK

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, judgment was entered in favor of plaintiffs on their claim for professional malpractice against defendants William Hohmeyer and Soils & Structures. Hohmeyer and Soils & Structures now appeal as of right. Plaintiffs cross appeal, challenging several of the trial court's rulings at trial and also challenging the court's pretrial ruling granting summary disposition in favor of defendants Michael Ohrling and Michael Reagan. We affirm the judgment against defendants Hohmeyer and Soils & Structures, but reverse and remand for further proceedings with respect to defendants Reagan and Ohrling.

Plaintiffs filed suit after selling their newly constructed house at a substantial loss due to numerous construction defects. Defendants Bricker, Ruhl, Wakefield, and Hunnington were principally responsible for the construction of the home. Defendants Reagan and Ohrling were building inspectors for the city of Norton Shores and, as such, were responsible for conducting city inspections throughout the construction process. Defendant Hohmeyer, a structural engineer who worked for Soils & Structures, Inc., was hired by plaintiffs to perform a structural inspection of the home before the real estate closing. Plaintiffs' purchase contract was contingent on a satisfactory inspection. After conducting the inspection, Hohmeyer informed plaintiffs that there were no "stoppers" or "show stoppers." Plaintiffs thereafter completed the purchase of the property. After closing, they found numerous problems with the home, including several structural defects about which they were previously unaware. Significantly, plaintiffs learned that trusses in the attic had been cut and that some of the home's brick was not installed per the construction plans.

Plaintiffs sued the named defendants. Defendants Ruhl and Bricker filed for bankruptcy and defendant Wakefield settled with plaintiffs. Defendants Ohrling and Reagan were dismissed on summary disposition after the trial court determined that they owed no duty to plaintiffs and were entitled to governmental immunity. Plaintiffs' breach of contract and professional malpractice claims were tried before a jury, which rejected the contract claim but found in favor of plaintiffs on the professional malpractice claim.

I

Defendant Hohmeyer¹ first argues that the trial court erred when it denied summary disposition to him and his company. This issue is insufficiently briefed in that it consists of one sentence, without any supporting discussion or citation to the record, claiming that plaintiffs failed to establish a standard of care. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Caldwell v Chapman*, 240 Mich App 124, 132-133; 610 NW2d 264 (2000). Hohmeyer also argues that the trial court "allowed a lot of irrelevant and incompetent evidence to be placed before the jury and erred in denying Plaintiff's motion for directed verdict." This argument is also not properly before us because Hohmeyer fails to explain his position or provide any supporting authority. See *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996). Hohmeyer also complains about the trial court's decision to allow plaintiffs to add an expert witness after the close of discovery and after his summary disposition motion was filed. This issue is not properly before us because it is not raised in the statement of questions presented; therefore, review is inappropriate. See *In re BKD*, 246 Mich App 212, 218; 631 NW2d 353 (2001). Moreover, Hohmeyer cites no authority to support his position that it was improper for the trial court to allow for the addition of the expert witness. See *Magee, supra*. And, we note that the witness was added well before trial and that Hohmeyer was allowed to depose the witness. There is no indication of prejudicial surprise, contrary to Hohmeyer's representations on appeal.

¹ Defendant Soils & Structures was sued on a theory of vicarious liability. Thus, we refer to Hohmeyer alone when discussing the arguments raised by both Hohmeyer and Soils & Structures.

II

Hohmeyer next presents several issues regarding the trial court's failure to grant a directed verdict. We review de novo a trial court's decision with regard to a directed verdict. *Candelaria v BC General Contractors, Inc.*, 236 Mich App 67, 71; 600 NW2d 348 (1999).

When evaluating a motion for a directed verdict, a court must consider the evidence and all legitimate inferences arising from the evidence in a light most favorable to the nonmoving party. A directed verdict is appropriate only when no material factual question exists upon which reasonable minds could differ. [*Id.* at 71-72, citing *Caldwell v Fox*, 394 Mich 401, 407; 231 NW2d 46 (1975).]

At the outset, we note that Hohmeyer attempts to persuade this Court that the claim against him involved a failure to warn and, as such, it could not survive the motion for directed verdict. Hohmeyer relies on the inapplicable decision in *Schutte v Celotex Corp.*, 196 Mich App 135; 492 NW2d 773 (1992), a products liability case against an asbestos manufacturer for failure to warn that exposure to asbestos could cause lung cancer. This is a professional malpractice claim.

In *Phillips v Mazda Motor Mfg (USA) Corp.*, 204 Mich App 401, 409; 516 NW2d 502 (1994), a case involving the malpractice of a structural engineer, this Court stated:

A malpractice claim requires proof of simple negligence based on a breach of a professional standard of care. Expert testimony is usually required to establish the applicable standard of conduct and its breach. [Citations omitted.]

To establish a prima facie case of negligence, plaintiffs were required to prove that Hohmeyer owed plaintiffs a duty, that Hohmeyer breached that duty, that there was causation between Hohmeyer's conduct and the resulting injury, and that plaintiffs suffered damages. See *Haliw v Sterling Heights*, 464 Mich 297, 309-310; 627 NW2d 581 (2001).

The evidence presented at trial, viewed most favorably to plaintiffs, was sufficient to defeat the directed verdict motion. First, there was evidence of a duty. Hohmeyer, a structural engineer, admitted that he was hired by plaintiffs to perform a structural inspection and that he received payment for the inspection. He further testified that people who hire him have a right to rely on him. He claimed that he had superior knowledge about structures and had conducted structural inspections for a long time. He agreed that if he failed to perform to a certain level of capability as a structural engineer, he should be held responsible.

Second, there was expert testimony to establish the standard of care. Hohmeyer, Merle Brander (plaintiff's expert), and Richard Reimbold (defendant's expert) were all structural engineers who were qualified as experts at trial. The testimony, although general and not entirely consistent, established a standard of care, which included determining what the project was, using common sense to conduct the inspection, and addressing the concerns of the clients, i.e., inform them of any structural issues. Further, to conduct a competent inspection and provide the necessary information, there must be a review of the house plans and construction documents. This expert testimony was sufficient to prove the applicable standard of care. See *Phillips, supra*.

Third, the testimony, when viewed in a light most favorable to plaintiffs, was sufficient to show that Hohmeyer breached the standard of care. Hohmeyer admitted that he was aware that plaintiffs were contemplating closing when he was hired and never reviewed the house plans or construction documents before reporting to plaintiffs that there were no “show stoppers.” Hohmeyer admittedly failed to inspect the roof trusses, which were undisputedly an important structural part of the facility, and failed to advise plaintiffs of any issues with respect to the trusses, which had been cut. Hohmeyer admitted that he needed the plans to properly inspect the house and that he did not have the plans until after he gave plaintiffs a verbal report and they proceeded to closing. Hohmeyer also admitted that he failed to inspect the whole outside of the house, that he never looked for access to the attic to check the roof trusses, and that he did not check to determine whether the steel lintels, as called for by the plans, were in place. Hohmeyer conceded at trial that, with respect to the missing steel lintels and the cut trusses in the attic, he did not conduct the best inspection he could have conducted. In sum, the testimony supported a finding that Hohmeyer failed to do what he should have done. He did not identify structural items that were inconsistent with the building plans and did not give plaintiffs all of the information they needed before closing.

Fourth, plaintiffs established the two elements of causation—cause in fact and legal, or proximate, cause. See *Haliw*, *supra* at 310; *Helmus v MI Dep’t of Transportation*, 238 Mich App 250, 256; 604 NW2d 793 (1999). A defendant’s conduct will be considered a cause in fact of damages if the damages, more than likely, would not have occurred but for the at-fault conduct. *Haliw*, *supra*; *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Legal cause requires the plaintiff to prove that, in light of the foreseeability of the consequences, the defendant should be held legally responsible. *Haliw*, *supra*.

Here, there was evidence that Hohmeyer’s conduct was a cause in fact of plaintiffs’ damages. The evidence supported a finding that, but for Hohmeyer’s conduct in failing to complete a competent structural inspection and provide plaintiffs with all of the facts about the home’s structure, plaintiffs would not have closed on the purchase of the home. Thus, they would not have sustained any of the claimed damages. Further, there was evidence of legal causation. Hohmeyer knew that plaintiffs were deciding whether to close on the house and that they were counting on him to review its structural integrity and report to them. Hohmeyer conceded that people who hire him have a right to rely on him. Hohmeyer told plaintiffs that, while there were some problems, there were no “show stoppers.” Relying on this report, plaintiffs went ahead with the purchase. Later, they learned more about the structure of the house, which information could have been learned before closing if Hohmeyer had completed a proper inspection. The foreseeable consequence of Hohmeyer’s negligence was that plaintiffs lost significant sums of money when they purchased the defective home.

Finally, with respect to damages, there was evidence that when plaintiffs sold the house for significantly less than what they owed on the mortgage, they lost their \$19,232.19 down payment, their \$3,000 in earnest money, \$450 in bank costs, and \$34,932.15 in interest they had paid on the mortgage note. In addition, after applying the proceeds of the sale, \$195,000, to the outstanding mortgage, they still owed \$160,312.06 on the mortgage debt, which they were paying in monthly payments to the bank. They also incurred moving costs to move away from the home after the sale. In total, there was evidence that plaintiffs needlessly incurred damages of \$231,690.81. The damages were not remote or speculative.

In sum, there was evidence to support all of the elements of a professional malpractice claim thus the trial court properly refused to grant a directed verdict in Hohmeyer's favor.

III

Hohmeyer next argues that plaintiffs failed to plead special damages pursuant to MCR 2.112(I) and, therefore, their damages should have been precluded. We disagree. Because this issue was not raised before or decided by the trial court, it is unpreserved and reviewed for plain error. See *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000); *Frericks v Highland Twp*, 228 Mich App 575, 597; 579 NW2d 441 (1998). To find plain error requiring reversal, error must have occurred, the error must have been clear or obvious, and the error must have affected substantial rights. *Kern, supra*.

MCR 2.112(I) requires that items of special damage be specifically stated. Hohmeyer argues, without citing any applicable authority, that the damages claimed in this case were special damages. However, the damages incurred by plaintiffs were general tort damages. Further, even if the damages should have been pleaded as special damages reversal would not be required because Hohmeyer's substantial rights were not affected. There was no surprise. Moreover, if Hohmeyer had objected at trial on the ground that the damages were not properly pleaded, plaintiffs may have been allowed to amend their pleadings. See *Grzesick v Cepela*, 237 Mich App 554, 563-564; 603 NW2d 809 (1999).

IV

Hohmeyer next argues that the trial court erred in allowing damages beyond the amount it would have cost to repair the items that were allegedly missed during the structural inspection. We disagree. The issue of what damages were allowable in this professional malpractice case presents a question of law and is reviewed de novo. *Cardinal Mooney High School v MI High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

In a tort action, the tortfeasor generally is liable for all injuries resulting directly from his wrongful act, whether foreseeable or not, provided that the damages are the legal and natural consequences of the wrongful act and are such as, according to common experience in the usual course of events, reasonably might have been anticipated. . . . A tortfeasor is excused from liability only for damages that are remote, contingent, or speculative. [*Antoon v Comm Emergency Medical Service, Inc*, 190 Mich App 592, 596; 476 NW2d 479 (1991) (citations omitted).]

Plaintiffs' theory with respect to their professional negligence claim was that they never would have closed on the property if Hohmeyer had properly performed his inspection and apprised them of all of the relevant facts. Plaintiffs presented evidence that supported that theory as well as the amount of money lost as a result of the purchase of the home, including the down payment, earnest money, interest on the mortgage they assumed, amount of money owed on the mortgage after the sale of the home at a reduced price, and moving expenses. The trial court instructed the jury in strict accordance with the applicable law on damages. We find no error in the trial court's ruling with respect to damages. The damages sought by plaintiffs were a natural consequence of Hohmeyer's actions, were not remote, contingent or speculative, and reasonably

could have been anticipated in accordance with common experience in the usual course of events. See *Antoon, supra*; *Schanz v New Hampshire Ins Co*, 165 Mich App 395, 407-408; 418 NW2d 478 (1988).

Further, we reject Hohmeyer's claim that the measure of damages is only the amount it would have taken to fix the structural problems he failed to identify. Plaintiffs' theory against Hohmeyer is not that his actions caused structural damage or required expenditures to make repairs. Their theory of liability was that if Hohmeyer had competently conducted his structural inspection and informed plaintiffs of all of the facts with respect to the home, they would not have purchased it at all. Under the circumstances, the measure of damages allowed by the trial court was proper pursuant to the general law on damages attendant to tort cases.

V

Hohmeyer also argues that the trial court erred by failing to require the jury to determine a separate dollar amount of damages caused by Hohmeyer and Soils & Structures. He argues that the trial court's decision to allow the jury to determine a total amount of damages and to subsequently allocate percentages of fault to them and other possible wrongdoers amounted to the imposition of joint and several liability. The argument is cursory and not supported by citation to any applicable authority therefore it is not properly presented for our review. See *Caldwell, supra*. Further, Hohmeyer's position on appeal is directly contrary to the position he took at trial, which was that the jury should find a total amount of damages and make percentage assessments against all possible tortfeasors. "[A] party may not take a position in the trial court and subsequently seek redress in an appellate court on the basis of a position contrary to that taken in the trial court." *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Moreover, the trial court's decision to allow the jury to determine plaintiffs' total amount of damages and apportion percentages of fault to all possible wrongdoers was entirely proper. See *Smiley v Corrigan*, 248 Mich App 51, 56-57; 638 NW2d 151 (2001).

VI

We decline to address Hohmeyer's argument regarding whether the settlement money paid by Wakefield was properly set off in the judgment. This issue is not raised in any of the statements of questions presented and is not properly before this Court. See *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997). Further, the argument is unsupported and cursory; therefore, it is not properly presented for review. See *Caldwell, supra*.

VII

On cross-appeal, plaintiffs argue that the trial court erred by instructing the jury on the affirmative defense of failure to mitigate damages because Hohmeyer waived the defense. We disagree. Claims of instructional error are reviewed for an abuse of discretion. *Grzesick, supra* at 558.

[A] party's most recent amended answer supersedes any previously filed responsive pleadings. Consequently, in order to be properly preserved, an affirmative defense must be expressly asserted, or expressly incorporated from a

former pleading, in each successive amendment of the original responsive pleading. [*Id.* at 562-563.]

When Hohmeyer answered plaintiffs' second amended complaint, he failed to file any affirmative defenses, thereby waiving the same. However, after numerous days of trial, plaintiffs pointed out that Hohmeyer had never answered the third amended complaint in the case. Hohmeyer filed an answer to the third amended complaint on the following day. In the answer, he alleged the affirmative defense of failure to mitigate damages. The answer was clearly untimely. See MCR 2.108(A)(1) and MCR 2.118(B). The trial court, however, noted that the issue of mitigation of damages was already woven throughout the trial and that, under the circumstances, it could accept the pleading as conforming to the proofs. Pursuant to MCR 2.118(C), we agree.

The issue of mitigation of damages was presented to the jury throughout trial without any objection. During opening statement, Hohmeyer's counsel raised the issue of failure to mitigate by indicating that plaintiffs did not do anything to fix structural problems identified by Hohmeyer. Through the first eight days of trial, Hohmeyer's counsel elicited evidence from several witnesses with respect to what plaintiffs failed to do to rectify structural problems before selling the house. Plaintiffs never objected to this evidence on the ground that failure to mitigate had not been pleaded. Only when the discussion turned to jury instructions did plaintiffs argue that mitigation was not within the realm of the pleadings. The issue was, by that point, tried with the implied consent of the parties. Thus, the trial court did not abuse its discretion in determining that it properly could accept the answer, which conformed to the evidence presented. See MCR 2.118(C)(1). We note that plaintiffs did not argue below, nor do they argue on appeal, that they were prejudiced or surprised. Based on the record, the trial court did not abuse its discretion in instructing the jury on the defense.

VIII

On cross appeal, plaintiffs also argue that the trial court erred by allowing the jury to apportion damages to wrongdoers other than Hohmeyer. Plaintiffs argue that Hohmeyer was the only "at fault" party with respect to malpractice and that all of the damages stemmed from the malpractice; therefore, the jury should not have been allowed to apportion fault to the builders and building inspectors. Resolution of the issue presented requires interpretation of the applicable statutes, in particular, MCL 600.2957 and MCL 600.6304. Issues of statutory interpretation involve questions of law, which are reviewed *de novo*. *Hinkle v Wayne Co Clerk*, 245 Mich App 405, 413; 631 NW2d 27 (2001).

In *Smiley, supra* at 55-56, this Court held that MCL 600.2957 and MCL 600.6304 are to be read together and require the trier of fact to determine the percentages of fault for all possible wrongdoers. See, also, *Lamp v Reynolds*, 249 Mich App 591, 596; 645 NW2d 311 (2002). The plain language of these statutes indicate that, in any action seeking damages, the jury must determine the percentage of fault against all persons who contributed to the injury or damages. The focus is not on the legal theory being pursued against a particular actor; rather, the focus is on the injury sustained and the percentage of fault of each actor who contributed to the injury or damages.

In this case, plaintiffs' third amended complaint alleged breach of contract and breach of warranties against Hunnington, Ruhl, Bricker, and Wakefield. It also alleged negligence against Hunnington. It further alleged gross negligence against Ohrling and Reagan. Finally, it alleged breach of contract and professional negligence against Hohmeyer and Soils & Structures. The damages pleaded for all of the claims were the same. The trial court properly required the jury to consider the nature of all persons "at fault" with respect to the alleged injury and the extent to which their conduct contributed to the plaintiffs' damages.

IX

Plaintiffs also argue that the trial court abused its discretion when it failed to allow them to present certain evidence as part of their claim of damages. The admission of evidence on the issue of damages is reviewed for an abuse of discretion. *Poirier v Grand Blanc Twp*, 192 Mich App 539, 546-547; 481 NW2d 762 (1992).

Plaintiffs wanted to offer evidence that, after they purchased the house, they spent extensive sums of money finishing and improving it, e.g., they installed Corian countertops and a granite island in the kitchen. The trial court refused to allow the evidence. It determined that when the home was sold, the sale price compensated plaintiffs for these items. In other words, part of the purchase price for the home reflected the improvements made by plaintiffs. Thus, allowing plaintiffs to recover for those items at trial would constitute a double recovery. We find no abuse of discretion in the trial court's ruling. Allowing plaintiffs to recover money for items for which they were already compensated through the sale of the home would have constituted a double recovery.

X

Finally, on cross appeal, plaintiffs argue that summary disposition for defendants Ohrling and Reagan, the Norton Shores' building inspectors, was improper. Decisions on motions for summary disposition are reviewed de novo. *Lockridge v State Farm Mut Auto Ins Co*, 240 Mich App 507, 511; 618 NW2d 49 (2000).

Ohrling and Reagan moved for summary disposition, arguing that they were immune from liability and that the gross negligence exception to governmental immunity was inapplicable because they owed no duty to plaintiffs. The trial court, relying on *Manor v Springport Township Zoning Comm'n*, unpublished per curiam opinion of the Court of Appeals, issued March 23, 1999 (Docket No. 203877), ruled that, absent a finding of a "special relationship," Ohrling and Reagan owed no duty to individual persons. The trial court ultimately concluded that, because the inspection of buildings for code violations is a duty owed to the public at large and not to individuals, no special relationship existed between Reagan and Ohrling and the plaintiffs; thus, there was no duty.

MCL 691.1407(1) provides that governmental agencies are immune from tort liability if engaged in the exercise or discharge of a governmental function. MCL 691.1407(2) provides an exception where there is gross negligence. Plaintiffs pleaded gross negligence in this case. "Summary disposition of a plaintiff's gross negligence claim is proper under MCR 2.116(C)(8) if the plaintiff fails to establish a duty in tort." *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001). Whether defendants owed a duty to plaintiffs is a question of law. *Id.* The

question may not, however, be answered by looking to the public duty doctrine and its special relationship exception. In *Beaudrie* the Court ruled that the public duty doctrine, and its special relationship exception, are inapplicable outside of cases where there is an allegation of failure to provide police protection from the criminal actions of third parties. *Id.* at 133-134, 140-141. The Supreme Court indicated that “the traditional common-law duty analysis provides a far more familiar and workable framework for determining whether a public employee owes a tort-enforceable duty in a given case,” other than police protection cases. *Id.* at 138, 140. In making its rulings, the *Beaudrie* Court emphasized that MCL 691.1407 does not preclude liability where government employees perform in a grossly negligent manner. *Id.* at 139-140.

Here, at the trial court level and on appeal, the arguments with respect to Ohrling and Reagan’s duty focus on the special relationship exception to the public duty doctrine. In *Beaudrie*, after ruling that the public duty doctrine and its exception does not apply when determining the issue of duty, the Supreme Court remanded the case to the trial court. *Id.* at 142. In this case, remand is also appropriate. The issue needs to be addressed in the context of the common-law framework with respect to duty. The parties have not addressed the duty issue in that manner and the trial court did not consider the issue in that manner. Accordingly, we reverse the trial court’s order granting summary disposition to defendants Ohrling and Reagan and remand for further proceedings with respect to those defendants.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh